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Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty

Report of the Secretary-General

Addendum

Summary

The present addendum contains information received from 18 States since the issuance of the report of the Secretary-General of 9 March 2005 on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (E/2005/3). With these replies, the total number of States participating in the seventh survey was 70, representing a 10 per cent increase in relation to the sixth quinquennial survey .

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I. Introduction

1. The present addendum is based on 18 additional replies received from States since the issuance of the seventh quinquennial report of the Secretary-General of 9 March 2005 (E/2005/3), namely, from Brazil, Brunei Darussalam, Ecuador, Estonia, Ghana, the Holy See, Jamaica, Madagascar, Panama, the Republic of Korea, Serbia and Montenegro, the former Yugoslav Republic of Macedonia, Tunisia, the United Republic of Tanzania, the United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe.

2. The Commission on Human Rights considered the report at its sixty-first session and on 20 April 2005 adopted resolution 2005/59, entitled "The question of the death penalty". At its fourteenth session, the Commission on Crime Prevention and Criminal Justice, having considered the report and having heard an oral summary of the additional replies received by the Secretariat, recommended for adoption by the Economic and Social Council draft decision I, entitled "Report of the Secretary-General on capital punishment and the safeguards guaranteeing protection of those facing the death penalty."[1]

3. The status of capital punishment in the 18 additional States that submitted replies was as follows at the beginning of the survey period:

(a) Seven were abolitionist for all crimes, whether in time of peace or war: Ecuador, Estonia, Holy See, Panama, the former Yugoslav Republic of Macedonia, Uruguay and Venezuela (Bolivarian Republic of);

(b) One country, Brazil, was abolitionist for ordinary crimes, meaning that the death penalty had been abolished for all ordinary offences committed in peacetime, such as those contained in the criminal code or those recognized in common law. Capital punishment was retained only for exceptional circumstances, such as those which might apply in time of war for military offences or for crimes against the State, but no execution had taken place since 1855;

(c) Two countries, Brunei Darussalam and Madagascar were considered de facto abolitionist, that is, they had not executed any offenders for at least 10 years;

(d) The eight remaining States provided for the death penalty in their legislation for ordinary crimes—Ghana, Jamaica, the Republic of Korea, Serbia and Montenegro, Tunisia, the United Republic of Tanzania, the United States and Zimbabwe—and some of them had also sentenced and/or executed offenders during the reporting period 1999-2003.

4. The updated figures of all the States that responded to the seventh survey are thus as follows: in total, by 15 June 2005, completed questionnaires had been received from 70 States, that is, 7 more than replied to the sixth survey (see E/CN.15/2001/10). Two thirds of them (46) were either completely abolitionist at the beginning of 1999 or abolitionist for all ordinary crimes. The 40 that were completely abolitionist were: Australia, Austria, Azerbaijan, Cambodia, Canada, Colombia, Costa Rica, Croatia, Denmark, Ecuador, Estonia, Finland, Germany, Holy See, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Mauritius, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and

Northern Ireland, Uruguay and Venezuela (Bolivarian Republic of). The six that were abolitionist for ordinary crimes on 1 January 1999 were: Argentina, Brazil, El Salvador, Greece, Malta and Mexico. Furthermore, seven replies were received from retentionist but de facto abolitionist countries: Albania, Brunei Darussalam, Madagascar, Latvia, Philippines, Senegal and Turkey. Finally, 17 (22 per cent) of the 78 countries that were retentionist at the beginning of 1999 replied to the survey—Bahrain, Egypt, Ghana, Jamaica, Japan, Morocco, Pakistan, Republic of Korea, Serbia and Montenegro, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Republic of Tanzania, United States, Uzbekistan and Zimbabwe—although by no means all of them completed all parts of the survey. Indeed, only 8 of the 17 provided detailed information on the number of persons sentenced to death and the number executed during the period 1999-2003.

5. The present addendum follows the structure of the main report, highlighting the information received subsequently under the relevant sections.

II. Changes in the status of the death penalty, 1999-2003

A. Countries that had abolished the death penalty for all crimes by the beginning of 1999

6. Of the seven States that were abolitionist at the beginning of the survey period, none reported any initiatives to reintroduce capital punishment during that period. Several reported that they were party to international or regional instruments providing for the abolition of capital punishment. Some reported that they were taking initiatives to promote the abolition of capital punishment in bilateral or international forums. The former Yugoslav Republic of Macedonia indicated that it had refused extradition in one capital case in 2002 because it had considered that the assurance given by the requesting State was not sufficient. Other States reported that they too had adopted a policy not to extradite persons to States for capital offences if not given the assurance that such punishment would not be implemented or that their law provided that extradition could not be granted to States for capital offences in the requesting State. Nevertheless, there had been no such cases during the reporting period. Several States also provided information on the punishments that had been substituted for capital punishment.

B. Countries that had abolished the death penalty for ordinary crimes by the beginning of 1999

7. Brazil was a party to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[2] All capital offences were military offences committed during wartime. A bill to abolish capital punishment completely, introduced in 2003, was under consideration by the Chamber of Deputies of the National Congress. It was reported that there had been a few initiatives by parliamentarians to introduce referenda or draft decrees or laws to reintroduce the death penalty for some crimes. These had been rejected on the grounds that the Constitution of Brazil provided that no amendments to the Constitution should be considered if they aimed at undermining individual rights and guarantees. The

Constitution provided that there should be no capital punishment except in time of war. The last execution had been carried out in 1855.

C. Retentionist countries at the beginning of 1999

8. Among the 10 retentionist States that submitted replies, Ghana, Tunisia and Zimbabwe only filled in section 4 of the questionnaire, on safeguards, while Serbia and Montenegro and the United Republic of Tanzania only filled in section 3, relating to the use of the death penalty. The United States did not fill in the questionnaire, but provided comprehensive information and statistics covering both the Federal State and the 38 states that provided for capital punishment in their law in 1999.

1. Retentionist countries that were de facto abolitionist at the beginning of 1999

9. Brunei Darussalam was also considered abolitionist de facto, as it had not executed any prisoner since 1957.

10. Jamaica reported that there was no settled policy not to execute persons sentenced to death and no moratorium on executions. The reason why no executions had taken place since 1988 was that, since 1993, decisions of Jamaica's final appellate court, the Judicial Committee of the Privy Council, had placed additional restrictions on the circumstances in which the death penalty could be carried out. In some instances the prerogative of mercy had been applied.

11. Jamaica also reported that various civil society groups were involved in discussions for the restriction and abolition of capital punishment, in particular the Independent Jamaica Council for Human Rights. There had also been research published by several independent bodies and scholars and a number of conferences had been organized in this area. The main reasons why capital punishment had not been abolished were: (a) perceptions that some aggravated murders deserved the death penalty; (b) the majority of the public being in favour of capital punishment; (c) religious perspectives; and (d) social anxiety about crime.

12. Madagascar noted that, because no executions had been carried out since its independence on 26 June 1960 and all capital sentences had been systematically commuted to sentences of life imprisonment with hard labour, it should be considered de facto abolitionist. It reported that a draft law on abolition was being prepared by the Ministry of Justice and would be submitted to the relevant authorities once it had been completed.

2. Retentionist countries and territories that enforced capital punishment at the beginning of 1999

(a) Retentionist countries that became abolitionist

13. Serbia and Montenegro reported that the Federal Republic of Yugoslavia had abolished capital punishment for all offences in 1993. In 2002, the Republic of Serbia had removed capital punishment from its criminal law and the country had thus become completely abolitionist. The reasons stated were democratization of society and respect for human rights.

(b) Countries that became or consider themselves as de facto abolitionist

14. According to the reply from Ghana, no executions had taken place in that country since 1990. According to other sources, the last execution had been carried out in 1993. While in Ghana persons convicted of murder or robbery leading to death had been sentenced to death during the reporting period, no executions had taken place. In reply to the question as to what procedures had been put in place to ensure that persons responsible for carrying out executions were fully informed until the moment of execution of the status of appeals for clemency for the prisoner in question, Ghana stated: "Basically, no executions are carried out." In Tunisia the last execution had taken place in 1991. Tunisia noted that there was a general moratorium on the execution of capital punishment. Both States had thus become de facto abolitionist during the reporting period.

(c) Countries that remained retentionist

15. In the Republic of Korea, some religious groups and human rights organizations were actively campaigning for the abolition of capital punishment and parliamentary groups were engaged in drafting laws aimed at abolition. The reasons for maintaining capital punishment were related to specific social, cultural and historical factors and the strength of public opinion against abolition. In 2003, the National Human Rights Commission of Korea had conducted research on public attitudes to capital punishment; that research had indicated that, while 80 per cent of professionals in non-governmental organizations and members of correctional committees and 60 per cent of members of the National Assembly and lawyers showed support for abolition, only 34 per cent of the general public and 10 per cent of public prosecutors, prison officers and medical officers were in favour of abolition.

16. The United Republic of Tanzania reported that it had restricted the scope of capital punishment during the survey period by abolishing capital punishment for children under the age of 18, pregnant women and mentally retarded persons. The reason stated was that by law such persons were regarded as incapable of "forming malice aforethought".

17. In its reply, the United States noted that the sanction of capital punishment continued to be the subject of strongly held and publicly debated views in the country. There were, and had been from time to time, legislative, policy and other initiatives to limit and/or to abolish the death penalty. However, it was also noted:

> "A majority of citizens have chosen, through their freely elected state and federal officials, to provide for the possibility of the death penalty for the most serious and aggravated crimes under federal, military, and most state law."

During the time frame encompassed by the survey, 38 of 50 states provided for capital punishment in the case of certain offences. However, in June 2004, the Court of Appeals of the State of New York had invalidated that state's capital sentencing statute on the basis of a state constitutional violation. In December 2004 the Kansas Supreme Court had declared that state's death penalty to be unconstitutional. The reply also stated:

> "When administered in accordance with all of the aforementioned safeguards, the death penalty does not violate international law. Capital punishment is not

prohibited by customary international law or by any treaty provision under which the United States is currently obligated. [...] We believe that, in democratic societies, the criminal justice system—including the punishment prescribed for most serious and aggravated crimes—should reflect the will of the people freely expressed and appropriately implemented through their elected representatives."

III. Enforcement of the death penalty

18. Among the 10 retentionist States whose replies are reported here, the following 4 provided information, including statistics in some cases, on the enforcement of capital punishment: Jamaica, Republic of Korea, United Republic of Tanzania and United States.

19. In Jamaica, during the reporting period 1999-2003, 51 males over the age of 18 had been sentenced to death for capital murder[3] by an ordinary criminal court of first instance, while only 15 were finally sentenced to death after the appeal/clemency process had been completed. Over the reporting period, 28 convictions were quashed, while 8 sentences were changed to imprisonment; 18 sentenced prisoners were granted a reprieve or commutation of sentence and 28 were pardoned. As at 31 December 2003, 97 persons were under sentence of death in Jamaica.

20. In the Republic of Korea, 31 adult male offenders had been sentenced to death by an ordinary criminal court of first instance during the reporting period. None of those convictions had been quashed or overturned by the courts of appeal. However, over the reporting period, pardons had been granted in 11 cases. As at 31 December 2003, 57 convicts were under sentence of death, compared with 40 on 1 January 1999. There had been no executions during the reporting period.

21. From the reply of the United Republic of Tanzania, it seemed that capital sentences had been handed down by the courts, but no figures were provided.

22. The United States provided a copy of the Bureau of Justice Capital Punishment Statistics (see http://www.ojp.usdoj.gov/bjs/cp.htm) for each of the years during the reporting period, containing information and detailed statistics for the Federal State and those states providing for capital punishment. The number of persons admitted to the prison system under sentence of death each year was as follows: 272 in 32 states and the Federal system in 1999; 214 in 27 states and the Federal system in 2000; 155 in 27 states and the Federal system in 2001; 159 in 27 states and the Federal system in 2002; and 144 in 25 states and the Federal system in 2003. Each year the following numbers had been executed: 98 men in 1999; 83 men and two women in 2000; 63 men and three women in 2001; 69 men and two women in 2002; and 65 men in 2003. Thus, the downward trend in the number of death sentences as well as in the number of executions over the reporting period outlined in the report of the Secretary-General (E/2005/3) was confirmed in the case of the United States. It should also be noted that, at the end of 2003, 3,374 prisoners were under sentence of death, most of them in California (629), Texas (453), Florida (364) and Pennsylvania (230). From January 1977 to 31 December 2003, 885 inmates had been executed by 32 States and the Federal

Bureau of Prisons. Two thirds of the executions had occurred in five states: Texas (313), Virginia (89), Oklahoma (68), Missouri (61) and Florida (57).

IV. Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty

A. First safeguard

23. The Representative of Korea indicated that the Government had recently expressed its intention to further reduce the range of crimes subject to capital punishment and that the relevant work had begun in that regard.

C. Third safeguard

1. Persons below 18 years of age

24. In Ghana, the minimum age was 17 years. The reply of the United States pointed to the decision of its Supreme Court in *Roper v. Simmons*,[4] which in March 2005 had found that to impose capital punishment on persons under the age of 18 at the time of the commission of an offence violated the eighth amendment to the United States Constitution. Before that decision, and at the end of 2003, 10 states provided for capital punishment for children aged 16 or in some states for children 14 years of age, 5 states provided for capital punishment for children aged 17 and 7 states did not provide for an authorized age for capital punishment.

2. Maximum age

25. Only in Zimbabwe was there a maximum age for sentencing or executing offenders. However, that age was not specified.

3. Pregnant women and new mothers

26. In Brunei Darussalam, Ghana, Jamaica and Tunisia, pregnant women could not be executed, but mothers of young children could. In Madagascar and Zimbabwe neither could be executed.

4. The insane and persons suffering from mental retardation or extremely limited mental competence

27. The definitions of mental retardation or extremely limited mental competence were as follows:

(a) Ghana: "Idiocy, imbecility, mental derangement or disease affecting the mind";

(b) Jamaica: "Such abnormality of mind as substantially impaired mental responsibility for acts and omissions";

(c) Republic of Korea: "A condition in which a person is unable to control his/her will because of mental or physical disability";

(d) Zimbabwe: "Insanity, diminished responsibility in terms of common law".

28. In Brunei Darussalam, the King could grant a pardon, respite or commutation to persons of unsound mind or he could order the person to be examined by not less than two medical officers to determine whether the person was insane or appoint a commission consisting of a judge or a magistrate and such number of suitable persons to inquire whether the person was mentally disordered or defective. In Madagascar, psychiatric experts would determine mental retardation or extremely limited mental competence; in Tunisia, those categories of offenders would benefit from mitigating circumstances and thus not be sentenced to capital punishment. In the United States, capital punishment was prohibited for the mentally retarded since the decision of the Supreme Court in *Atkins v. Virginia* of 20 June 2002[5] and the trial and conviction of someone who was mentally incompetent to stand trial was also prohibited.

D. Fourth safeguard

29. To comply with the fourth safeguard, a State must ensure that capital punishment may only be imposed where the guilt of the person charged is based on clear and convincing evidence, leaving no room for an alternative explanation of the facts. All the retentionist States that replied to this section of the questionnaire stated that this was the case. However, Ghana reported that a death sentence had been overturned because the appellate court had considered the evidence legally insufficient.

E. Fifth safeguard

30. The fifth safeguard concerns procedures for a fair trial by a competent court, including adequate legal assistance at all stages of the proceedings. Brunei Darussalam noted that the accused did not have a right to a counsel of his or her own choosing from the moment of arrest and that legal representation was provided by the State. In Tunisia, legal aid was provided for, although the accused could not choose the lawyer to represent him or her. In Jamaica, legal aid was also provided, although not all lawyers participated in the legal aid scheme. In the Republic of Korea, such assistance was provided from the time of indictment, but efforts were being made to amend the Penal Procedural Code to provide for counsel from the time of arrest. The United States noted that the procedural safeguards for capital prosecutions included providing reasonable notice of the charges before trial, adequate legal counsel and other necessary resources and the opportunity to prepare an adequate defence at trial, before a fair and impartial court.

F. Sixth safeguard

31. All the retentionist States that replied to this section of the questionnaire reported that they abided by the sixth safeguard (providing for appeals against a death sentence) and they also provided details of the procedures in place. In Zimbabwe, such review was automatic. In several other States, namely, Brunei

Darussalam, Jamaica and the Republic of Korea, the appeal was dependent on the lodging of an appeal by the convicted person. The period allowed for launching an appeal was, in order of length, 7 days in the Republic of Korea, 28 days in Brunei Darussalam and 42 days in Jamaica.

G. Seventh safeguard

32. All the retentionist States that responded to this section noted that every person sentenced to death had the right to seek a pardon or commutation of sentence.

H. Eighth safeguard

33. All the responding retentionist States reported that they abided by the eighth safeguard, which guarantees that no person would be executed pending any appeal or other recourse procedures, including pardon or commutation of sentence. However, only Jamaica replied that execution was suspended until all avenues of appeal through international bodies had been exhausted. Brunei Darussalam noted that there was no involvement of international bodies in the matter.

I. Ninth safeguard

34. The retentionist States that responded to the questionnaire employed a variety of forms of execution. In the United States, the number of states authorizing lethal injection had increased from 25 in 1993 to 37 in 2003. In 2003, 98 per cent of executions were by lethal injection compared with 68 per cent in 1993. Other methods that can be used in certain circumstances in some states of that country were electrocution, lethal gas, hanging and firing squad. In Brunei Darussalam, Jamaica and Zimbabwe, execution was by hanging. In the Republic of Korea, hanging was the method of execution under the Penal Code, while under the Military Penal Code the method was shooting. In Ghana, the methods used were hanging, shooting by firing squad and lethal injection.

V. Conclusions and recommendations

35. Notwithstanding the positive trend showing an increase in the total number of States participating in the survey, a large majority of the replies were from countries that were abolitionist or abolitionist for ordinary crimes only (66 per cent). Indeed, 43 (54 per cent) of the 79 countries that were completely abolitionist at the end of the survey period replied to the survey, as did 8 (67 per cent) of the 12 that were abolitionist for ordinary offences only. However, only 7 (17 per cent) of the 41 that were de facto abolitionist and 12 (19 per cent) of the 62 States that were retentionist at the end of the survey period replied to the survey, often providing only incomplete information.

36. Accordingly, the additional replies confirmed the main conclusions contained in the report of the Secretary-General (E/2005/3), in particular with regard to the

fact that many retentionist States did not provide accurate and comprehensive statistics on the number of death sentences imposed, appeals allowed or executions carried out by age, gender and type of offence.

37. With regard to the safeguards, the additional replies highlighted the need to clarify the concept of the "mentally ill", as opposed to the insane or the mentally retarded, as there appeared to be different definitions among the countries reporting. There has been some progress in restricting the scope of capital punishment, however, and in restricting further the imposition of the death penalty on those under the age of 18 at the time of the offence.

Notes

[1] *Official Records of the Economic and Social Council, 2005, Supplement No. 10* (E/2005/30), chap. I, sect. C, draft decision I.

[2] Organization of American States, *O.A.S. Treaty Series No. 73* (1990).

[3] Defined as "murder of a member of the security forces, a judicial officer, a constabulary force officer, a witness, a Justice of the Peace; murder in the furtherance of certain serious crimes; multiple murder".

[4] 125 S.Ct. 1183 (2005); see also E/2005/3, para. 81.

[5] 536 U.S. 304, 122 S.Ct. 2242 (2002).